

A Briefe DECLARATION

For

What manner of speciall Nufance
concerning private dwelling Houses,
a man may have his remedy by Assise,
or other Action as the Case
requires.

Unfolded in the Arguments, and
opinions of foure famous Sages of the Com-
mon Law; together with the power, and extent of
customes in Cities, Townes, and Corporations, con-
cerning the same: together with the determi-
nation of the Law, concerning the commodity, and
use of Houses, and their appurtenances.

Whereunto is added,

*The Iustices of Assise their Opinion, concerning
statute-law for Parishes, and the power of Iustices of Peace,
Churchwardens, and Constables; and to know what they
are to doe concerning Bastards borne in their Parishes,
reliefe of the Poore, and providing for poore
Children, what remedy for the same.*

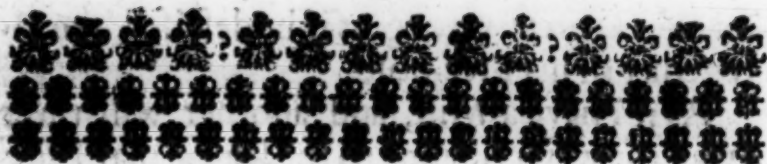
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sold at his shop, neere Furnivals-Inne gate in
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DECLARATION

[illegible]

The following is a list of the names of the persons who have been elected to the office of Justice of the Peace for the year 1900, in the several townships of the County of Cook, Illinois, at the annual election held on the 1st day of November, 1900.



The Arguments, and opinions of foure famous Sages of the Common Law touching the power, and extent of customes of Cities, Townes, Corporations, and Inheritances, together with the determination of the Law concerning the commodity, and use of Houses with their appurtenances, and wherein an action may be maintaineable concerning the same, and wherein not.



Man hath a house, and the windows thereof open into an others mans house, whether hee may build a house, so as to stoppe up the same lights, or not : concerning which, I purpose to shew you my opinion, and likewise to shew unto you the necessity and use of Houses.

*Mr. Mounsons
argument.*

The first, and chiefe use of an house is to defend man from the extremity of the winde, and weather. And by the receit of comfortable light, and wholsome ayre, into the same to preserve mans body in health.

Therefore who so taketh from man so great a commodity as that which preserveth mans health in his castle, or house, doth in a man-

manner as great wrong as if he defeised him altogether of his Free-hold.

As if I have a Mill, and another will turne away the water running to the same, I may bring an Assise against him.

So, if I have a Pipe, which conveyeth water unto my house through the ground of another man, and he will cut my pipe, I shall have an action against him : In like manner who so stoppeth my light, is the cause that no ayre can enter into my house, without which no man can live, and a house lacking light, is rather a dungeon then a house.

If one who hath a horrible sicknesse be in my house, and will not depart, an action will lye against him, and yet he taketh not any aire from me, but infecteth that which I have.

So if one cast filth neere unto my house, I may bring my action against him. If a man build so high that his house droppeth on my house, I shall have remedy against him.

And though light and ayre be common, yet if by any mans owne act they may bee made private, they may not then bee taken from him, and if they be, he shall not bee without remedy.

This appeareth by Hawkes, and Deere, which be *fera natura*, yet if by mans industry they are made tame, the owner will thereby gaine property in them: but peradventure it will bee sayd, The soyle is his owne, and it is *Dammum*

absq;

absq; injuria, what then : though it be his owne, he must so use it, that hee hurt not his Neighbour.

As if a man had a Pond of water, and will suffer it to drowne his neighbours land, he shall have remedy against him.

If a man be bound to repaire the bankes of the sea that it drowne not the land adjoyning, and so doth not, but the land is drowned; an action lyeth against him. You may perhaps say there is plenty of light remaining, this notwithstanding our action will lye very well, for the taking away, or impayring part thereof. As an action was brought *quare arctavit*, and 2.H.4. where a man had a way and another plowed the same, and it was thought there that an action would very well lie, and yet the way remained. If I have common in your Land, and you will plough part of the same Land, I shall very well maintaine an action against you. So it is of Common of Estovers, and piscary: And yet in all these cases, the whole is not gone, but some part remaineth. This proveth that though he hath not stopped the whole light of the house, yet for that he hath stopped parcell, an action is very well maintainable, but if you had said, that on the same side there had beene plenty of light, it might have better stood with reason.

As touching your custome; whereby a man may stoppe his neighbours lights : I thinke this

is rather *malus usus*, then any custome: for as I have learned of Mr. Hales, a custome is thus defined, *Consuetudo est jus non scriptum nunquam repugnans rationi naturali*, and therefore if any custome swerve from reason, and naturall equity, it is but *malus usus*; and for that to bee abolished, for by entendment, and consideration of the law, and reason, every custome had a reasonable beginning, as that case in 35. H. 6. of selling Jewels in Cheapside may have a reasonable beginning. In like manner the custome of *Gavelkind*, that Sonnes shall equally inherit the Lands of their Fathers. Such is the custome, that if a woman marrie without licence, that she shall loose her dowrie.

So is it also of the custome that one towne may enter Common with another. All these, and such like may well bee thought to have a reasonable beginning.

Otherwise it is, where by intendment their beginning cannot be thought reasonable.

As that a man shall pay reliefe, when that hee shall marry his daughter. And as the custome is in Mich. 35. H. 6. fol. 31. of the pledging of goods: So it is of the custome, to arrest a man before the day of payment. In like sort in 2. H. 4. that the tenant shall not put his beasts into the Common, before the Lord hath put in his, which peradventure hee will never doe, so it is 10. H. 6. If the Major of a towne will prescribe to impound all beasts which shall bee damage

damage felonet in his owne pound, and there to keepe them till he bee satisfied as he list, or if he prescribe to use, and occupie the same beasts howsoever he pleaseth.

In 2. R. 3. and 22. E. 4. one demanded whether it were a good custome, that if the Mayor of a towne suspect a man, that hee may arrest and imprison him 3. dayes : this was thought no good custome, but to be most abhorring, and dissonant from reason. And therefore forasmuch as houses bee necessary, and cannot bee without light, and ayre, their beginning was lawfull, necessary, and reasonable, but that a man might stoppe up his neighbours lights, was never necessary, neyther had lawfull, or reasonable beginning, neyther at any time obtained the force of a law, or custome, for in K. Henry the 2. his time, it was but a constitution in *London*, and not any custome, or law, and therefore never allowed, or confirmed by Parliament, for *Magna Charta Ca. 9.* did confirme such old liberties and customes as *London* had at that time : And therefore, if this were not any law or custome at the time of the making of that statute, it neyther was nor could bee confirmed by the same, for the more generall Statutes shall have a reasonable construction. As the Statute that doth prohibite maintenance, shall have a construction, for lawfull maintenance is not thereby prohibited. The like law is that where it is sayd, that a fine shall bee a Barre to a *feme*
coverte,

coverts, this is to be understood of a good, and lawfull fine, so this confirmation by Parliament of customes, and liberties of London, shall bee intended a confirmation of all their good, and lawfull customes, and not of unreasonable, or wrongfull usage, such as in 27.H. 6. if the house of tenant for terme of yeeres decay, that then he shall pay no rent, &c. But if your custome were then good, and so confirmed by Parliament, yet the words thereof may not bee stretched to our case, the words are *visus fenestrarum*, and the Civill law sayth, a man may *estop visum*, and not *lumen*, *lumen est descendens de caelo*, *visus est meus prospectus ad terram*.

And our law sayth, *petis visum terrae*, And *visus* and *lumen* differ. But Sir you cannot in this case defend your selfe both by the Common law and custome too. For you ought absolutely to trust to the one of them, and if you had plead thus by way of Barre, your plea without all doubt would have beene double.

As if a man will pleade affeasement with warrenty, and rely not on the warrenty, this plea is double. So in the case at the Barre, you plead both the common Law, and the custome, and your plea is double, and therefore for all these causes I thinke the plaintiffe ought to recover.

Mr. Plowden.

Mr. Plowdens
Argument.

Albeit it hath beene alleaged, that the windows

dower have bene time out of memory there,
 and the lighis ancient, it is all one, as if the
 house had bene built at this day. Put the case
 there is a pale betwixt your ground and mine,
 and you build to the uttermost part of mine,
 by your first building I am bridled and stop of
 my building; And in the Country who to ma-
 keth a hedge, will make a dike in the uttermost
 part upon his owne land. So hee that maketh a
 Parke, will leave ground out of the same com-
 passe without the pale for his Keeper to walke
 about it, for there hee may better heare if any
 body bee there within, then if he were within
 himselfe, And this is called free-bownd. If a
 man build his house so high that it droppeth on
 mine, an action will very well lye, for there is
 a manifest hurt, and wrong done unto me: But
 22. H. 6. where the *Prior* of *St. Edees* had three
 Mills, an other man built an other by them, hee
 could not have any remedy for this. But if any
 of his tenants which held of him by grinding
 at his Mill grinde at the new Mill, the *Prior*
 may have an action against him, for hee whose
 the land is, might use the same for his greatest
 commodity, and gaiae.

If a man cut downe Trees which fall upon
 an other mans land, hee shall have his action;
 otherwise it is, if a Tree fall by reason of winde.
 So in our case: of our owne soyle we may make
 the best, as in 12. H. 8. a man had a pond, and let
 the same runne out, whereby the next dwellers

land was drowned, this was but *damnum absque iniuria*, wherefore no action would lie. In 4 E. 2. a man had a Lime kiln, which destroyed the Fruit of his neighbour, who maintained his action: for in that case this taketh place, *Sic utere tuo ut alienum non laedas*. And Mr. Baskall saith in his booke, if a man have a Dye house, and the water which runneth in his house, hit letth the Fish of another, an action lyeth. If a man cast fish under my walls, I may punish him for it. And in the 46. E. 3. The Prior of Bachburgh had a sluice, whereby Salmons came in, and one stopped the same, wherefore hee had his action. Like whereas one cutteth away the water, which runneth to my Mill, for the prooffe whereof Mr. Baskall put a case out of 19. E. 3. where an Assise was brought for two things, one because hee had levied a house to stop the light, an other, because he could not repaire the same: There it was thought, that no action would lye, because hee might have remedied this in the beginning when hee built his house. And the case was in 7. Edw. 3. in the last poynt, and there the Lawyer sayd, that hee might have left space enough in his owne Land, and the party was non-suted. *Hermood's report* hath two verses,

Sape recardare si debes edificare

Vt poteris stare cum eam vis reparare.

But you ayde your selfe with a prescription that

that you have had light time out of mind, this
is no good prescription, for a prescription must
be against some party. But this is against God;
You say further, that the other had no house,
which is not good, for a prescription must be in
the affirmative, and this is in the negative, and so
sayeth Peffer in 20 H. 8. that a man cannot pre-
scribe in the not having a house. And a writing
it to be the usage, and the law, and the custom.

An usage is generally, and a constitution spe-
ciall in 12. E. 4. And diversity is taken between
usage, and custom; for that a custom is nothing
disagreeing from the Common law, but not com-
mon, so also it would not be beautiful that Ci-
ties should have any voyd places in them, and it
would be most honorable that they should be
populous. And therefore was there a Statute
made 27. H. 8. & 2. p. 1. that there should not be
any voyd places in diverse Citties, & also houses
are necessary for the sustenance of many in 12.
E. 4. there is a custom that if a man plough
his Land, hee might wigne his plough upon an
other mans land: and this was thought a good
custom for the favour of Tillage; which more
our case of Building is to be favoured 2. R. 2.
the custom is, that a Fish-man may drive stakes
into an other mans ground to dree his Nets,
which was allowed for a very good custom.
likewise 15. E. 3. is prescribed that when the
Hay was carryed out of a certayne Medow, that
he should occupy the land untill our Lady day,
which was allowed by the Court. So a man
may

may prescribe to have Common of estovers in another mans Land; and to cutt them down himselfe. The Lord in ancient demesne prescribed, that if the villaine of another Lord remained a yere and a day in ancient demesne, that then it shall not be lawfull for his Lord to take him from thence. In like manner, one may prescribe to have gravill in my Land; and all these customes stand very well with reason. If I have a way, and another man plow up the same, I cannot have an action on my case, but I must have an assise and so is the booke in s.d. 4. Mr. *Frodo* sayth that all customes must stand with reason. And in s. E. 4. it is sayd, that albeit all customes are confirmed, yet they must be examined, by the rule of reason, as the custome of *Gyvelande* standeth with reason. The Statute that giveth a writ of *revisement*, *de Gard to Guardian* in soccage shall bee extended to the Mayor, and Aldermen of *London*, to give them like remedy which was confirmed by 1. E. 3. Also the Statute that no man shall give lands in Mortmaine, yet Citizens and Freemen of *London* may give lands in Mortmaine by their custome, which custome is also confirmed by act of Parliaments. As for the doublenesse of the plea I will not say any thing, for that it is not any Justification, but onely for to diminish the damages; if perhaps it bee found against us. And therefore upon the whole matter, I thinke the plainriffe ought not to recover in this action. I thinke the contrary, and first I will consider these foure things.

First,

First, whether such buildings, *ex opposito*, be a nuisance by the Common law. Mr. Wrayes
Argument.

Secondly, whether this custome be a good custome.

Thirdly, whether such kinde of buildings be for the beautifying of the City.

Fourthly, whether the sayd confirmation by Parliament make this custome good, or not.

As touching the first matter, the nuisance which is supposed to be in stopping up of windows in the South part of an house, I conceive is a nuisance by the Common law, for by the Common law, one shall not hurt the Freehold of another, and no greater hurt, grievance, or damage can be done to any mans Freehold, then to take away the light and ayre thereof, which is comfortable, & commodious for him, for when this light, and ayre are taken from him, his house remaineth as a dungeon. And divers cases there bee where a man taketh away from another not the thing it selfe, but the commodity of the thing, and for that he shall have his remedy by action: as if I have a water running through your ground unto my Mill, and you will turne away the course thereof, or stop the same, I may bring an assise 9. E. 3. *pls.* 19. yet I will confesse, that if an other build a Mill by my Mill, I may not have any action, as 21. H. 6. for it is *damnum absque injuria*. So it is in 2. H. 4. in the case of the Schoole *cadem ratiō*. But if any ought to grinde at my Mill,

Mill, and another will hinder them, an action lyeth 9. H. 6. fo. 45. where the Pryor of St. Bartol had a Fayre, and one interrupted the commers thereto, whereby his Toll was impaired, and yet not his Fayre, but the profit of his Fayre taken away, and hee had remedy. So in our case he hath not medled with our Freehold, and yet hath he hurt our Freehold. So in 4. E. 2. 13. E. 3. If I have a Fayre, and the King will grant another, if my Fayre bee impaired by this I shall have an action, and so of a Ferry, and the reason is, because a man is compellable to maintaine his Fayre, Ferry, or Market, and if he doe not, it is punishable in a Leete. But of a Schoole, otherwise it is, for that a man is not bound to maintaine it, but Houses in Cities men are bound to maintaine, and that by Statute, otherwise they may incur the punishment. 18. E. 3. one built his house so high over mine, that the raine dropped from his upon mine, and it was thought there that an action was maintainable, yet that hurt might have beene amended *a fortiori* in our case where the hurt is perpetuall, and cannot be amended. And if for a way an action lyeth, as it is in the 4. E. 3. much more for an hurt to our health, which above all things men have regard unto, for the prooffe whereof we have a writ in the Register *de leprosa amovenda*. Likewise the selling of corrupt meate, whereby mens bodies may susteine harme, is punishable in a Leete, which proveth

proverth that the Common law hath regard un-
to the health, and welfare of every private man.
There is a case in 4. E. 3. lib. ass. pla 3. where one
built a Lime kilne, and his neighbour was annoy-
ed by the smoke thereof, and had his remedy. If
a man shall be punished for smoke, which may
be avoided, and dureth but at times, what shall
we thinke of the taking away of light, and ayre,
which cannot be amended, but remaineth a con-
tinuall and perpetuall nuisance: as for the cases in
19. E. 3. which hath bin avouched so oft to make
strongly against us, I take them to be one case,
for so much as the Iustices which speake in one
place, speake also in the other place; and last of
all in both cases, the case was thus, an assise of nu-
sance was brought, and the Plaintiffe counted
how the defendante had levied a house, so that
thereby his light was stopped up, and that hee
could not so well come to his house as he did be-
fore, also that he could not repaire his house so
well as he could before.

Here he said, as to the light be it a nuisance, such
a one as it is. *Tiel. quel.* for the repaying none, for
when a man buildeth, he must leave so much
space on his owne ground that he may come to
repaire his house, and if hee had thought that
stopping of his light had bin no nuisance he would
not have said, be it a nuisance *Tiel. quel.* but have
said as he did to the other case of repaying, it
is no nuisance. And therefore for the first matter,
I thinke this to be a nuisance by the Common law.

As

As touching the second matter, whether this custome be a good custome or not, and I thinke the same is no good custome. For *consuetudo est in drc. ut supra*, a custome is not against law, and reason, but this custome of yours is against reason, and is in effect, as if a man should take my life from me, for these bee the instruments to maintaine, and preserve mans life, and the law sayth, *sic utere tuo, ut alienum non laedas*, therefore a custome against this precept, is *malus usus*, and therefore *abolendus*, as the case in 21. E. 4. It the Kings Bayliffe or any other Bayliffe distraine Cattell, and bring them to the Lords Pound, and if the owner did not within three dayes agree with the Lord, that then he should loose his Cattell, this was thought unreasonable and not allowed for any good custome. So in 9. H. 6. where there the Lord of a Leet would have prescribed to have all the waste ground, but hee could not, because it was against reason, that he who had nothing in the Land should have the waists. Like unto the sayd case in the 35. H. 6. fo. 31. of pledging of goods, and such is that case in 43. E. 3. where the Lord of the Manor would have prescribed, that none of his Tenants should marry their daughters without his licence; this custome was thought to bee against all equity, and reason. In 13 E. 3. in a *dum fuit infra statum*, one would have prescribed, that if the Plaintiffe could number 12. he might alien his land by the custome: this is not a reasonable custome, for

for a man may be able to number 12d. and yet not have discretion enough to alien his Land. So it is likewise against naturall reason, that one should barre me of my light, and ayre, without which I cannot live, and therefore these things be of necessity. Also it is against the Law that one should meddle with the Freehold of another man, unlesse it be for a Common-wealth, as 8. E. 4. where one justified the setting in of stakes for to drie his nets, and likewise in the 11. H. 2. where one brought an action for taking or driving his Hogges, the Defendant justified, because the custome of the City was, that if any mans Hogges came into the City, and upon warning given to the owners to keepe them out; if they came againe, that then they shall be forfeited. This is a reasonable custome, because Swine are beasts that may cause diseases to bee in a City, and therefore it is against the Common-wealth, in 22. E. 4. Where it is sayd, that a man may turne his plow upon another mans land, that is a good custome, for by this meanes no land shall be unsowne, which is for the maintenance of Tillage, and the benefit of the Common-wealth. But this your custome is but a private custome, and not for the maintenance of the Common-wealth, and therefore is like unto the custome in 42. E. 3. that if the tenant cease to doe his custome, the Lord may enter, this custome standeth not with the Common law, neither with the Statute which put-

teth the Lord to his *cessavit*, and giveth him not any entry. So it is to bee thought of the custome in 2. H. 4. that the Tenants shall not put their beasts into the Common before the Lord hath put in his, which peradventure hee will never doe, so that the Tenants shall never have their Common. So it is if a man prescribe that the alienation of the Husband of the Lands of his Wife shall bee good without examination of her. Like law of the Custome in 43. E. 3. that if any goods bee wayned in any manner, and if any man take them, that then it shall bee lawfull for me to distraine, and detaine the distresse untill such time as I am satisfied by these cases rehearsed it is manifest, and cleare that all usages against naturall reason, and the Common law of this Realme, are not customes, but evill usages, and not to be allowed. So in our case a custome to take away a mans light, and ayre, preservers of health, must needs be *malus usus*, and therefore ought to bee taken away; For good usages stand with reason, and as *Bracton* sayth, must give place to reason, and law. But you will say, that the Law of your City is such: I say, if it stand not with reason, and law, it shall not bee allowed. As 10. E. 3. in an appeale brought by a Citizen, the defendant waged battaile, the Citizen said the custome of *London* is such, that a stranger should not wage battaile against a Citizen, this was thought no good custome, nor sufficient to deprive a man of

of a benefit, which the law giveth him. And so in 27. H. 6. in an action of debt upon a lease for yeeres, the defendant sayd that the custome was, that the plaintiffe should repayre the houses, and if not, that the defendant should pay no rent, this was thought to bee no custome allowable. For the third point, this is no beautifying at all to the City. In our case Mr. Hayles his house is an ancient house, and therefore against reason that by latter building, the commodity, and use of the same should bee taken away. You say also that it is a thing honourable to have buildings in Cities; This I grant, and I thinke no man will deny it: but by building of one, to impaire a better house, this is not any beautifying, or honour at all to a City, but rather the contrary. For the fourth matter, if the custome be not good, the confirmation cannot make it good: for as I take the law, the common learning is, that a confirmation cannot make a voide thing good: as for a confirmation *est firmum facere id quod non firmum fuit ante, sed fuit tamen* 26. H. 8. If an Infant grant an advouson, and at his full age confirmeth the same, by this confirmation nothing is wrought. So it is in the case of 33. E. 3. where the lease for yeeres was made by a Bishop, and he dyed before the yeeres expired, the successour confirmeth the said lease, and *nihil operatur*. Likewise in 39. H. 6. the King granted an advouson to one, and after granted the Mannor with the advouson to

another, and after the confirmation is made, yet the advouson passeth not. But where the Statute limiteth, that men may devise unto corporations in Mortmaine, yet if they will devise to any that is not a Corporation, it is without warrant : And also albeit a man may not wage his law in *London*, yet if at the Common-law, an action be brought against him, hee may : So it is of the case in 20. H. 6. that if one be brought before the Sheriffe, that the Mayor may dismisse him, yet after judgement hee may not dismisse him.

Likewise 12. E. 4. where one would have prescribed to buy things without paying of tolle, that he could not be allowed. And therefore I will conclude that such customes as stand with law, and reason, are to bee allowed, and contrary such as swerve from the rules of law, and reason, to be disallowed. As this custome of yours, that a man should stop his neighbours lights is altogether unlawfull, and unreasonable, and therefore the plaintiffe ought not thereby to bee barred of his action.

Mr. *Manwood*,

Mr. *Manwoods*
Argument.

Here be two matters chiefly to bee considered, whether by the Common law this bee a nuisance, to stop up part of a mans light, then if the Common law seeme to be doubtfull, whether the custome will helpe us, or not, divers cases

cases have beene put, when a man toucheth
 not the Free-hold of another, but on his owne
 land doth wrong unto another mans. But all
 these cases doe vary from our case, for they are
 where a man hath a private profit in a thing, and
 another by doing an act upon his owne land
 taketh away the same, wherefore an action will
 lie, as the case in 46 *Edw. 3.* where the Abbot of
Buckhurst had Salmons, comming in at sluice
 from the Sea, and a stranger stopped the same,
 so that they could not come, and hee had his
 action. So it is where one taketh away my way,
 because this is a thing locall. And so if water
 running to my Mill, if one miscarry the same :
 generally wheresoever I have a private profit,
 or interest, and one barre mee of the same, it is
 injury : but the ayre is not any element locall,
 neyther may any man miscarry it, for it suffe-
 reth nothing to be voyd, also light, and ayre be
 not things of necessity, but of pleasure, and be
 not any profit in *certo loco*, and therefore not
 like unto other cases of things both profitable,
 and also necessary. The case of the Ferrie I will
 grant, that if I have a Ferrie to transport men,
 and another will erect another I shall have an
 action, because that I am compellable to main-
 taine it, and the not keeping of it, is present-
 able in a Leete. The same law is of the Market,
 where the King granteth another Market *ad*
monumentum of mine, I may have a *Scire-facias* to
 repeale his letters patents if he have these words

in them, that the grant should not bee to the hurt, or prejudice of any other market; and if not, I shall have an action on my case: your case was also compared to the case in 4. E. 3. and 4. ass. pla. 3. where the ass. was maintained, not for that the plaintiffe was annoyed by the smell of the smoke, but because his Apple-trees, and other his fruits were destroyed by the same, and this is a good reason, for that it is to his disinherittance. As for the case of the Lime-house at Ratcliffe, and the smoke of Smiths houses which cast many unfavoury smells, it is *damnum absq; injuria*. And I my selfe was by a Smith annoyed by the smell of his smoke, but yet might I not have any action against him. In 18. Edw. 3. one built an house so high that it dropped from his to mine, in this case an action will lye, for my tyles are thereby consumed, *gutta cavat lapidem*. So of the case in 2. H. 5. if by common assent our Houses joyne and a gutter is made betwixt us, if I plucke up my part, you may maintaine an action against mee. All these cases hitherto put, have beene of taking away a locall commodity, or else of consuming something.

The case of the filth I finde not in my booke, but in the booke of Entries, and there it was *Per parietes*, so that the walls were hurt thereby. But I will agree with you, that if all your windows were stopped, that an action will lie, and where you say *sic utere tuo ut alienum non ledas*, this

this is not meant of things of pleasure, but of things of profit. And here is not any part of your house consumed, but herein a let of your pleasure onely, for which your action is not maintaineable. And if I have a Windmill, and another will build another by mine, I cannot have any action against him, 11. H. 4. 7. E. 3. 22. H. 6. But otherwise it is of a Water-milne, *9. assisar. pla. 19.* where one had a Watermill, and another built neere unto him, so that hee could not grinde so much as hee was wont, in this case a man may very well mainetaine his action. If I have an Inne, and another set another in the same Towne, hee is not punishable, but if hee will stop my guesse, which come to my house, I shall have remedy. If I have a Brew-house, and another build another by mine, I shall have no action. 12. H. 8. If water fall on my land, and I make a Sluice, and let it out of my land unto another mans; this is dispunishable, for every man may doe this one after another untill it come unto the River, but if it be a river, otherwise it is; For there it is in *loco certo*. If one house should not bee adjoyning unto another, it would bee a great deformity, and if *Cheapside* were so built, it would be a strange *Cheapside*. And the Civill lawes say, that two lights on the former part, and backe of an house, are sufficient. And if you make your windowes into our garden, this is a wrong done unto us, for by this meanes I cannot talke with my friends

in my Garden but your servant may see what I doe, and so the wrong first begun in Mr. Hales. And therefore *Vim vi repellere licet*. And I S hath not consumed, or hurt any part of his house, but interrupted him of his pleasure onely. But I further affirme, that for every hurt a man may not have an action, but if a man be oftentimes hurt, he may very well have an action. As if the Lord distraineth for rent, an action lyeth not, but if he distraine so oft, that I cannot plow my land, I shall have an assise. So the Kings grant of exemption to one is good, but if it bee to divers, it is not good. But if the Common law would not helpe us, yet custome will, & where-as it hath beene sayd, that it is against naturall reason, and law, it is not so, *Consuetudo ex rationabili causa privat communem legem*, and unlesse it doe *privare communem legem*, it is no custome. As that an Infant of 15 yeeres age, may alien. For at this age he may consent to marriage, therefore in as great reason may he alien his lands; and in some places any Infant of 9 yeeres may binde himselte apprentice, which is a good custome and standeth with reason. But some customes there are that be not good, As that the tenants shall not drive their Beasts into the Common before the Lord hath put in his. So if the lessee will prescribe to surrender at his will, 7. H. 6. otherwise it is of the custome in the 14. H. 4, that the Tennant shall not alien without the presentment of the same before, this is a good custome

custome, and yet against common reason, but yet if it hath any taste or smatch of reason, it shall be allowed. As if the Lord prescribeth that the tennant shall not Common with any beasts, but those which were bred on the same land, this is good, for this will cause the tennant to breed Cattrell, likewise that a *feme sole Merchante* shall sue without her husband, this is good, and yet against Common law, and reason, because the husband hereby is discharged of all such busines: therefore if a custome have any part of reason, it shall be allowed. As *8. E. 3.* that a man may make an estate to his wife during her life, and that should bee as good as an endowment *ad osium ecclesie*. So is it of the custome of the *Isle of Man*, that to steale a Capon, or a Pigge, shall bee Felony, and not to steale a Horse, or Cow, for that the one may bee hid, the other may not. Likewise is it, that the youngest sonne shall inherit, because hee is lesse able to helpe himselfe. So is it of the custome of *Kent*, The Father to the bough, the sonne to the plow, and yet directly against the Common law. So I thinke of the case of Hogs put by *Mr. Wray*, for that in the time of pestilence it is dangerous to let them come into Citties.

This Citty is the greatest Citty, and most populous in this Realme, and the more populous the more honourable, & the more buildings, the more populous and honourable will it be. And

therefore Building is to bee favoured. And by this building all his light is not stopped, but parcell. And Mr. *Hales* thereby looseth no not any great commodity, but is restrained of a little pleasure, for which hee cannot maintaine his action.

To the act of Parliament I will speake nothing, but this I will say, that if any custome bee meerly voyd of reason, it is not good. As the custome in 5. H. 7. that if the Lord distraine the beasts of his tenants for rent, that hee may detaine them untill hee be satisfied at his pleasure; and 21. H. 7. that if any doe breake the Pound he shall pay 3 l. this is a voyd, and unreasonable custome to binde an estranger, and yet by common consent of the Lord, and tenants, it is good to binde the tenants.

So if I prescribe, that if any mans Sheepe goe on my ground all the day, to have the foldage of them in the night, is a good custome, because by common entendment the owner hath *quid pro quo*. So our custome is for the maintenance of the Citty, neyther is it against the common law directly, neither hereby any offence, or hurt is done unto Mr. *Hales*, for his House is not thereby impayred. And therefore, I thinke his action will not lye.

Finis de senx. Arguments.

RESOL.

Resolutions of the

Judges of Assises,

1633.

1. Question.



Hether the Church-wardens, and Over-seers of the poore of a Parish with assent of two Iustices of the Peace, one beeing of the Quorum, may by the Statute of 43. *Elizabeth*, cap. 2. or any law enforce a Parishioner of the same Parish to take a Childe of a poore parishioner of the same parish, who is not able to keepe his sayd childe, to be an apprentice?

Resol. The Statute of 43. of *Elizabeth*, which sayth, that the Church-wardens and over-seers of the parish shall put out Children to bee apprentices, necessarily implyeth, that such as are fit must receive Apprentices, and the putting out of poore Children to be apprentices is one

of the best wayes for the providing for the
poore.

2. Q. If they may, then whether they must
not give money with him, and who shall deter-
mine what money shall bee given with him,
if the party that is to take such an apprentice,
and the Church-wardens, and Overseers cannot
agree thereupon?

Resol. There is no necessity that money must
be given, but that must be left to the discreti-
on of the Church-wardens, and Overseers,
all circumstances of age and ability, beeing
considered, and if they cannot agree with
the party, then the Iustices of Peace neere
adjoyning, or in their default the Sessions
of peace are to determine these Controver-
sies.

3. Q. Whether a Knight, Gentleman, Cler-
gy-man, or Yeoman, or one that is Sojour-
ner, using husbandry, cloathing, or grasing,
or the like, may be enforced to take such an ap-
prentice?

Resol. Every man who is by calling or pro-
fession or manner of living, that entertaineth,
and must have the use of other ser-
vants of the like quality, must entertaine such
apprentices, wherein discretion must bee
given upon due consideration of circumstan-
ces.

4. Q. Whether a wealthy man keeping few
or no servants, nor wanting a servant, but li-
ving

ving privately may be enforced, to take such an apprentice; if not, then whether hee may bee taxed towards the putting forth of such an apprentice?

Resol. For the receiving of such apprentices, the answer may bee referred to the question next before; but out of doubt every such person must contribute to the charge, as to other charges for the provision for the poore.

5. *Qu.* Whether they may enforce a parishioner that is of one parish, to take such a childe, apprentice, that is of another parish, but within the same County or division, if the proper parish be not able to provide for the children of the same parish?

Resol. The Iustices may provide Masters for them in other parishes within the same hundred; if the same hundred be not able, then out of that hundred in the rest of that County; As for other provision for the poore, which must bee at a quarter Sessions.

6. *Q.* If such a Parishioner may be enforced to take such an apprentice, and shall refuse not onely to take such an apprentice; but also refuse to be bound to appeare at the next quarter Sessions, or Assizes, what shall bee done to him?

Resol. If any refuse, let such a one bee bound over to the next Sessions or Assizes; if he refuse to give such bond, let him bee sent to

the Gaole, there to remaine untill hee will give such bond.

7. Q. If such a Parishioner who refuseth to take such an apprentice shall bee bound over to the Sessions for not taking such an apprentice, and when hee appeareth there, shall likewise refuse, what shall bee done to him, and what shall bee done to the Parents who refuse to suffer their Children to bee put out to bee apprentices, themselves not being able to maintain them?

Resol. If at the Sessions or Assizes such a one refuseth to take an apprentice and his excuse be not allowed, it is fit he bee bound to the good behaviour, and it will be a good course to indict such a refuser for a contempt, and thereupon to fine & imprison him; if he refuse to be bound to the good behaviour, let him be imprisoned untill he will; & the Kings book of orders directs that such bee bound with good sureties to appeare at the Councell board; & if the Parents of such poore children refuse to suffer their children to be bound apprentices, or being bound, omit them away, themselves not being able to maintain them, let them bee committed to the house of correction.

8. Q. Whether it be in the power of any generall quarter Sessions to mitigate any penalty upon a Statute law, if the party indicted shall submit himselfe to the fine of the Court, and waive the traverse?

Resol.

Resol. If the party be convicted or confesse the fault, it is not in the Power of the Court to mitigate the fine, in such cases where the Statute makes it certaine: but if the party indicted protesting his Innocencie, yet *quia noluit placare cum domino Rege* puts himselfe up into the grace of the Court, the Court may impose a moderate fine, and order to forbear the prosecution.

9. Q. If any be bound to appeare at the Sessions, and shall tender submission to the Court, whether the Sessions may stay the indictment, and mitigate the fine aforesayd upon the confession of the fact?

Resol. This is answered before to the next precedent Article.

10. Q. If a man be convicted for being drunk, tipling, and keeping an unlicensed Alehouse, or being licenced, for suffering others to remaine tipling in his house, or for swearing or driving Cartell upon the Sunday contrary to the Statute in that case provided: whether the Iustice of Peace, before whom hee was convicted, or any other Iustice of the Peace may discharge him of all or part of the Forfeiture or punishment appoynted by the Statute?

Resol. The Iustices have no such power of mitigation after conviction, where the Statute appoynts the measure of the punishment.

11. *Qu.* Whether a Constable may upon a warrant for carrying one to the house of correction for keeping an unlicenced Alehouse upon the second conviction, break open the house wherein the party convicted is, to apprehend him?

Resol. This question is to be advised upon, it is put in generall termes and referred to be considered in the particular where it appeareth.

12. *Qu.* If a woman unmarried be hired from weeke to weeke, or from halfe yeere to halfe yeere, in one Parish, and there is gotten with child, and then goeth from thence unto another parish, where she is setled in service by the space of two or three moneths, and then discovered that she is with childe: The question is, whether shee shall be setled in the Parish where she was begotten with childe, or in the Parish where she was last setled?

Resol. The place where such a woman was lawfully setled, is the direction in this case, not where she was begotten with child.

13. *Qu.* If a woman-servant unmarried bee begotten with child, and then goeth out of her Mistres service, before or after it is discovered that she is with child, and the reputed father be runne away, or is not able to free the Parish: whether the Master may be enforced to provide for her till shee bee delivered, and for a moneth after?

Resol.

Resol. If the Master hath legally discharged his house of such a servant, hee is no more bound to provide for her then any other.

14. *Qu.* In case a Parish consist part of ancient *Demeasne*, and part of *Guildable*, an Affize is made for the reliefe of the maihemed Souldiers, the Gaole, &c. according to the Statute of 24. *Elizabeth*, cap. 2. whether the tennants in ancient demesne shall contribute with the Guildable for the payment of the Affize?

Resol. The Statute doth not distinguish between the ancient Demeasne and the Guildable in these cases, *ubi lex non distinguitur, ibi nec nos distinguimus.*

15. *Q.* Whether an Indictment of forceable detainer bee within the Statute of 1. *Iacobi*, cap. 5. and not to be removed by *Certiorari*, unless the partie Indicted first finde sureties according to that Statute, and whether the party Indicted bee to be bound in his absence to prosecute according to that Statute, and whether an Indictment of forcible entry, &c. found at a private Sessions bee to be removed by *Certiorari* without sureties, according to that Statute?

Resol. This is fittest to be left unto the Court of Kings-bench, to whose Commission, and jurisdiction this is most proper.

16. *Q.* If one be convicted upon the Statute of 3. *Car. R.* cap. 13. for driving of Cattell

on the Sunday through severall parishes; whether hee shall forfeit 20. s. to every of the sayd Parishes; or onely to one; if to one, then to which of them?

Resol. This Statute giveth the Forfeiture but of one 20. s. for one Sabbath day. Although the driving on that day bee through divers Parishes. Therefore where the action is first attached, and the distresse first taken, that parish shall have the benefit of the Forfeiture, and not the other.

17. *Qu.* If one who is under the age of 30. yeeres, and brought up in Husbandry, or a mayd-servant, or brought up in any of the arts or trades mentioned in the Statute of 5. *Elizab.* 6. 4. and not enabled according to that Statute, to live at his or her owne hand, shall bee warned by two Iustices of the Peace to put him or her selfe in service by a day prescribed by them, and shall not doe the same accordingly, but shall after continue living at his or her owne hand, what course shall bee taken with such a person, and how punished?

Resol. Such persons being out of service, and not having visible meanes of their owne, to maintaine themselves without their labour, and refusing to serve as an hyred servant, by the yeere, may be bound over to the next Sessions or Assizes, and to be of the good behaviour in the meane time, or may be sent to the house of correction.

18. *Qu.* Whether the tax for the reliefe of the poore, upon the Statute of 43. *Elizabeth*, shall bee made by ability or occupation of lands, or both, and whether the visible ability in the parish where hee lives; or generall ability wheresoever, and whether his rent received, within the Parish where hee lives shall bee accounted visible ability, and whether hee shall bee taxed of them onely and for any Rents received from other Parishioners: and what shall bee sayd visible ability?

Resol. The Land within each parish is to be taxed to the charges in the first place equally and indifferently, but there may bee an addition for the personall visible ability of the parishioner within that Parish according to good discretion, wherein if there be any mistaking, the Sessions, &c. or the Iustice must judge betweene them.

19. *Q.* Whether shops, salt-pits, sheds, profits of a Market, &c. beetaxable to the poore as well as lands, Cole-mynes, &c. expressed in the Statute 43. *Elizabeth*?

Resol. All things which are reall, and a ycerely Revenue, must be taxed to the poore.

20. *Q.* Whether the tax for the County stocke, Gaole, and house of Correction is to bee made by the Statute of 14. *Elizabeth*, cap. 43. *Elizabeth*: by ability, and upon the Inhabitants of the parish onely, or upon

them, or the occupiers of Lands, dwelling in that parish: or whether such as occupy lands in that parish, and dwell in another parish shall be taxed:

Resol. If the Statute in particular cases give no speciall direction, it is good discretion to goe according to the rate of taxation for the poore: but when the Statutes themselves give directions, follow that.

21. Q. Whether any taxes ought to be made for the charges that petty Constables and Bor-shoulders are at in conveying rogues from parish to parish, and relieving of them and how to be rated?

Resol. It is fit to relieve the Constable and Tything-men, in such sort as it hath beene used in the severall places where they live.

22. Qu. Whether a Justice of Peace may discharge a servant being with childe from her service, allowing that as a reasonable cause that she is thereby made unable to doe the service which otherwise she might have done, and if hee may discharge her, whether that Parish shall provide for her, till her delivery, if she cannot provide for her selfe: and so also if her time be expired before her delivery, who shall provide for her after her time ended?

Resol. If a woman being with childe procure her selfe to bee retayned with a Master who knoweth nothing thereof, is a good cause to discharge her from his service. And if shee bee be-

begotten with childe during her service, it is all one, but the Master in neyther case must turne away such a servant of his owne authority. But if her terme be ended, or shee lawfully discharged; the Master is not bound to provide for her, but it is a misfortune fallne upon the parish, which they must beare, as in other cases of casuall impotency.

23. *Qu.* Whether being delivered of a bastard childe in one parish, and goeth into another with her childe; and becomes vagrant, and so is sent to the place of her birth: her bastard childe being under the age of 7. yeeres, shall bee settled with the mother, and there maintained, if the mother be not able, nor the reputed Father knowne, found: or whether it shall be sent to the place of its birth, or being settled with the mother, whether the Parish where it was borne, shall be ordered by the two next Iustices to pay a weekly summe towards the maintenance of it?

Resol. The Bastard childe must bee placed with the mother, so long as it is within the quality or condition of a Nurse childe, which shall bee, till seven yeeres of age; and then it is fit to be sent to the place of its birth to bee provided for, the mother or reputed father, not being able. And the Parish where the childe is borne shall not be forced to contribute to the charge, as long as the Mother lives, and the child be under 7. yeeres old.

24. Q. A man with his Wife and Children takes an house in one Parish, for a yeere: and before the end of his terme is unlawfully put out of possession, and after taketh part of an house, asan Inmate in another Parish, from whence hee is also put out, and then not being able to get any dwelling, they come to lye in a Barne in a third Parish where the Husband falleth sicke, and the Wife is delivered of another childe, where ought these to bee settled?

Resol. If a man or woman having house or habitation in one parish be thrust out, this is an illegall unsettling which the Law forbiddeth, for none must bee enforced to turne vagrant, and such one must bee returned to the place where hee or shee was last lawfully settled, and the Childe also borne in the time of this distraction.

25. Q. Whether an apprentice put out by the Churchwardens, &c. according to the Statute to a Master in another Parish, if his Master dye and leave no Executor or Administrator fit to keepe an apprentice or able to place him: Hee shall bee provided for in the parish where hee was apprentice or shall bee sent backe to the parish from whence hee was put out?

Resol. Servants and apprentices are by law settled in that parish, and if they become impotent there, the parish must abide the adventure,

tate after their terme or time of service be lawfully ended.

26. Q. What is accompted a lawfull setling in a parist., and what not?

Resol. This is too generall a question to receive a perfect answer to every particular case which may happen: but generally this is to be observed, that the law unsetleth none who are lawfully settled; nor, permits it to be done by practice, or compulsion, and every one who is settled is a native householder, sojourner, an apprentice or servant for a moneth at the least, without a just complaint made to remove him or her, shall be held to be settled.

27. Q. A rogue is taken at C. and will not confesse the place of his birth: neyther doth it appeare otherwise but that hee confesseth the last place of his habitation to be at S. hereupon he is whipped and sent to S. at his coming to S. the place of his birth is there knowne by some to be at W. and thereupon the rogue confesseth it to be so: whether he might without any new vagrancy be sent to W?

Resol. In this case it is fit to send such a rogue to the place of his birth: for this is but a mistaking and no legall setling.

28. Q. If an Indictment be preferred to the grand Jury of the quarter Sessions of the peace against one for murther, manslaughter, for robbery, felony, or Petilarcy, and ignoramus found therupon, whether the said Sessions may deliver the party by Proclamation or not?

Resol.

Resol. Not by Proclamation at all, but for petty Lacenyces, and other petty Fellowies; in discretion the Gaole may be delivered of them.

29. Q. If a Constable be chosen and refuseth to take his Oath, what shall be done, and whether a Constable may make a deputy, and by what means?

Resol. The refusall or neglect to take oath in such a case is a contempt worthy of punishment, and thereupon to fine, and imprison him, and the making of a deputy is rather by toleration, then by law.

30. Qu. If a Constable dye or remove out of the parish where, &c. how is his place to be supplied?

Resol. By the Lord of the Leete, if that time fall neere, otherwise by the Sessions; but if that bee too farre off, then by the next Iustices;

31. Q. If a poore weake man be chosen Constable or Tything-man, and bee unfit for the place, how may hee be removed, and a fit man sworne in his roome?

Resol. The Iustices of Peace must helpe this, and if the Lord of the Leete have power to choose a Constable or Tything-man and performe so ill, it is a just cause to seize his liberty.

32. Qu. If a Nurse-childe, a Scholler at a Grammar-schoole, or in the Vniversity prove
to

to be impotent by Sicknesse, lamenesse, lunacy, or discovery of Ideocy, &c. how such persons shall be disposed?

Resol. A Nurse, childe, or a Scholler at the Grammar-schoole, or at the Vniversity, or persons sent to the Common gaole, Hospitall, or houses of Correction, are not to bee esteemed as persons to be settled there, more then Travai-lers in their Innes, but their settling is where their Parents are settled, and Children borne in common Gaules, and Houses of correction, their parents being prisoners, are to be main-ained at the charge of the County.

33. *Qu.* What proportion Parsonages, or Tiches shall beare to the taxation of the poore of the parish?

Resol. The Parson or Vicar presentative, shall according to the reasonable value of his Parsonage, having consideration to the just deductions.

34. *Qu.* Whether for the placing the poore of the parish, not to bee removed by consent of the parish, these poore men may not bee placed as inmates for a time?

Resol. They may by expresse words of the Statute of the 43. of Elizabeth.

35. *Qu.* If a parishioner or owner within a parish do bring into the parish without the consent of the Parish, a stranger of another parish, which is, or apparantly is like to bee burthen-some unto the parish, how they may ease themselves?

Resol.

Resol. By taxing such a one to the charge of the rates of the poore, not onely having respect to his ability or the land he occupies, but according to the damage and danger he bringeth to the parish by his folly.

36. Q^y. For warding in the day-time, for apprehending of Rogues, whether the Constable may not enlarge it to a farther time?

Resol. Warding in the day-time is of great use, and must bee left to the discretion of the Constables or direction of the Iustices to vary according to the occasion.

37. Q^y. Whether Alehouses ought to bee allowed only in therow-fare Townes, and others in other places to bee restrained onely to sell to the poore out of doores.

Resol. The Iustices shall doe very well to allow none but in places very fit for theyr situation and uses, and to moderate the number.

38. Q^y. A man for his quality otherwise fit to be a Constable, or of other Office of that nature, procures himselfe to bee the Kings servant extraordinary, and by that meanes would excuse himselfe to serve in the County?

Resol. A servant extraordinary may well performe his ordinary service in the Countrey according to his quality.

The Iustices opinion touching the Commissions by
which the Iustices sit at Newgate.



HE Iustices at Newgate sit by
vertue of two Commissions (viz.)
Gaole delivery and Oyer, and de-
terminer.

By the Commission of Gaole
delivery they may try all prisoners in the Gaole
or by Bayle, or such as bee indicted will render
themselves generally for all Felonies: and al-
so for such other offences as are particularly as-
signed to them by Statute.

The Statute of 4. Elizabeth 3. cap. 2. doth
give them power to receive Indictments a-
gainst Prisoners or such as are upon bayle, and
to proceed to try the same (viz.) Indictments
taken before the Iustices of the peace, and
by equity thereof all Indictments before cor-
oners, *g. Man. Bro. Commission. omnium.* 24. layth
That the Commission is *ad deliberand. Gaol. de*
prison. in eisdem existens. But they cannot take
Indictments as Iustices of Gaole delivery, but
being Iustices of the peace, they may take In-
dictments against prisoners, but not against
them that bee at large, forasmuch as power

Anciently felo-
nies included
all trespasses,
therefore the
Iustices of
Gaole delivery
have power to
hold plea of
trespasses a-
gainst them in
prison or upon
bayle to ren-
der themselves.

v. r. *Mar. Dyer,*
99. Iustices of
Gaole delivery
hold pleas of
all appeales
of felony or
murder against
one in prison
by their gene-
rall Com. and
of appeales: so
by the same
reason to take
Indictments,

is given them, consequently they must have
means to doe so, which is by Indictments,
Id quondam.

Howsoever it is cleere, that they may enquire
of many offences and take Indictments in such
cases where power by the Statute is given to
the Iustices of Gaole delivery, in such cases
where they have authority by Law or Statute
there the tytle of Indictments is, that *Ad pas-
sam deliberationem sent.* before the Commis-
sioners of Gaole delivery, *I. S.* was indicted, and
the record must be made up so.

And whereas by the Statute of *2. Hen. 3.
cap. 2.* Indictments taken before Iustices of
peace, or Coroners, or any other against any
Prisoners, then the entry of the Indictments
is returned taken, *Memorandum quod ad generalem
Sessionem sent.* before *A, B, C. &c.* Iustices at
peace in *Com. Middlesex* or *London, I. S.* was in-
dicted, and then tryed before Iustices of Gaole
delivery, and by vertue of the sayd Statute, In-
dictments taken before Iustices of the peace of
London or *Middlesex*, are tryed before the Iusti-
ces of Gaole delivery, but his power is not

The Commissioner of Oyer and Terminer is
Ad triand. inquirend. audiend. & determinand.
They may enquire of all offences mentioned in
the Commission, albeit the offenders bee at
large, but they cannot try Prisoners upon In-
dictments taken before any other then them-
selves, as the Iustices of Gaole delivery may by
the

the aforesayd Statute, unlesse there bee a Speciall Commission made, as it was in the case of the Earle of *Leicester*, mentioned in *Plow. Com.* 3. Mar. Bro. Com. 24. for the ordinary Commission of Oyer, and Terminer is *ad inquirend. audiend. & determinand.* therefore they cannot determine of things unlesse they made enquire first, and on the other side also the Iustices of Gaole delivery may try Indictments taken before Iustices of the peace, yet if one indicted before Commissioners of Oyer and Terminer, the Iustices of Gaole delivery cannot try the same, because the Record of the Commission of Oyer and Terminer are to bee returned in the Kings Bench, 44. E. 3. 31.

The Commission and the Records of the proceedings before the Iustices of Gaole delivery, are to bee returned to the Custos Rotulor. of the Countrey, when the same persons are Iustices of Gaole delivery, and of Oyer and Terminer, they may sit the same day and place, and enquire by the same Inrie, but the entry of the Records must be severall, according as the Indictment is.

At the Assises in the Countrey, the Iustices have their severall power as the Iustices of Gaole delivery, Oyer and Terminer, and Iustices of the peace.

But when the Records are made up, they must bee according to the power they made election to proceed upon.

This is the regular and legall course. But the Clerkes of the Assizes promiscuously make entry thereof, But if a Writ of Error bee brought, they must certifie according to Law, or else it will bee erroneous, and so upon a *Certiorari*.

The Sessions of *London* may bee begun at the Guild-hall, and then adjourned to Newgate, if some Indictments bee at Guild-hall, then those must bee so certified: if others at Newgate, then the adjournment must bee mentioned, and that the Indictment was then taken.

Note that the tryall of Indictments taken before Iustices of the peace of *London*, cannot bee tryed at Newgate, as in nature of a tryall before Iustices of the peace at *London*, for many of the Commissioners, for Gaole delivery, are not Iustices of the peace for *London*, but in such cases the tryall must be before the Iustices of Gaole delivery: as upon Indictments taken before the Iustices of the peace of *London*; as in the case of Indictments taken before the Iustices of the peace of *Middlesex*.

But if Indictments at Newgate be originally taken before them, as Iustices of Gaole delivery, then it is inquirable how the Iurie sworne, and impannelled to enquire at the Sessions of the peace for *London*, or *Middlesex*, doe serve to present Indictments before the

the Iustices of Gaole delivery at Newgate, unlesse the custome and usage will warrant, the two severall Iuries, sworne at the Sessions of the peace for London, or Middlesex, are also by the same oath and impannelling to serve for the grand Iury for the Commission of Gaole delivery, and Oyer, and Terminer.

Vpon conference with Mr. *Keeling*, and the Clerkes for Newgate of London, and Middlesex, and the Clerkes of Assizes, and view of the severall Entries, a more mature and certaine resolution may bee given, this being in hast, and without such considerations as were requisite.

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